

1 Motion for Summary Judgment, ECF No. 18, be **DENIED**.

2 **JURISDICTION**

3 On January 16, 2008, Plaintiff protectively filed an
4 application for supplemental security income insurance benefits,
5 alleging disability beginning June 3, 2005. Tr. 15; 91. In his
6 application for benefits, Plaintiff reported that his ability to
7 work was limited by social anxiety disorder, major depression and
8 bulimia nervosa. Tr. 95. Plaintiff's claim was denied initially
9 and on reconsideration, and he requested a hearing before an
10 administrative law judge (ALJ). Tr. 55-64. A hearing was held on
11 September 15, 2009, at which vocational expert K. Diane Kramer, and
12 Plaintiff, who was represented by counsel, testified. Tr. 28-52.
13 ALJ Moira Ausems presided. Tr. 28. The ALJ denied benefits on
14 August 27, 2010. Tr. 12-24. Plaintiff sought review with the
15 Appeals Council, which denied review. Tr. 1-3. The instant matter
16 is before this court pursuant to 42 U.S.C. § 405(g).

17 **STATEMENT OF THE CASE**

18 The facts of the case are set forth in detail in the transcript
19 of proceedings and are briefly summarized here. At the time of the
20 hearing, Plaintiff was 21 years old and living with his sister in
21 her apartment. Tr. 32; 42. He finished the 11th grade, but the
22 following year his father died, he declared his homosexuality, and
23 he testified that "everything just went downhill from there." Tr.
24 32. Plaintiff said he is interested in getting his GED online, and
25 would like to eventually attend art school. Tr. 33.

26 Plaintiff regularly attends group and individual therapy, and
27 he has been able to stop his self-mutilation. Tr. 35-36. Plaintiff
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1 still engages in binge eating, followed by purging, three or four
2 times per day. Tr. 36-38. He testified that he tried
3 methamphetamine as a method of weight loss, and he used once a
4 weekend for about a year. Tr. 40. Plaintiff said he stopped using
5 about one year prior to the hearing. Tr. 40. Plaintiff testified
6 that he never leaves his room, and he will go to the store only if
7 he must. Tr. 42. Plaintiff has a driver's license, but it is
8 suspended due to an unpaid ticket. Tr. 43.

9 Plaintiff said he uses the computer, and while online, he
10 retouches people's photographs. Tr. 34-35. He borrows movies to
11 watch from his sister and brother. Tr. 44. When asked how much
12 time he spends inside his room in his sister's apartment, Plaintiff
13 said, "Most of the time. Like everyday. Every day all day. I
14 really don't leave my room unless I have to." Tr. 45-46. Plaintiff
15 explained the reasons for not wanting to leave his room: "Just I
16 don't like being around people. I'm afraid they'll judge me. I
17 mean, I know that's normal, but I take it to the extreme. I feel,
18 I feel ugly, fat - I don't - I don't need to show everybody." Tr.
19 46. Plaintiff testified that he has problems with anxiety every
20 day. Tr. 46. During those episodes, he testified that he feels
21 like he is going to die, and his palms get sweaty, he becomes light-
22 headed and he "freak[s] out." Tr. 46.

23 ADMINISTRATIVE DECISION

24 At step one, ALJ Ausems found Plaintiff had not engaged in
25 substantial gainful activity since January 16, 2008, the application
26 date. Tr. 17. At step two, she found Plaintiff had the following
27 severe impairments: dysthymic disorder, adjustment disorder with
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1 mixed features, generalized anxiety disorder, bulimia nervosa,
2 borderline personality disorder, and polysubstance abuse. Tr. 17.
3 At step three, the ALJ determined Plaintiff's impairments, alone and
4 in combination, did not meet or medically equal one of the listed
5 impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R.
6 §§ 416.920(d), 416.925 and 416.926). Tr. 17. The ALJ found
7 Plaintiff has the Residual Functional Capacity ("RFC") to perform
8 "work at any exertional level with the following nonexertional
9 limitations: he is limited to the performance of simple routine
10 tasks that do not involve contact with the general public or contact
11 with co-workers on more than an occasional basis." Tr. 19.

12 In her step four findings, the ALJ found Plaintiff's statements
13 regarding pain and limitations were not credible to the extent they
14 were inconsistent with the RFC findings. Tr. 20. The ALJ found
15 that Plaintiff had no past relevant work, but after considering
16 Plaintiff's age, education, work experience, and residual functional
17 capacity, jobs exist in significant numbers in the national economy
18 that Plaintiff can perform, such as kitchen helper, cleaner,
19 industrial, and laundry worker. Tr. 22-23.

20 STANDARD OF REVIEW

21 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
22 court set out the standard of review:

23 A district court's order upholding the Commissioner's
24 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
25 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
26 Commissioner may be reversed only if it is not supported
27 by substantial evidence or if it is based on legal error.
28 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to

1 support a conclusion. *Richardson v. Perales*, 402 U.S.
2 389, 401 (1971). If the evidence is susceptible to more
3 than one rational interpretation, the court may not
4 substitute its judgment for that of the Commissioner.
5 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
6 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

7 The ALJ is responsible for determining credibility,
8 resolving conflicts in medical testimony, and resolving
9 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
10 Cir. 1995). The ALJ's determinations of law are reviewed
11 *de novo*, although deference is owed to a reasonable
12 construction of the applicable statutes. *McNatt v. Apfel*,
13 201 F.3d 1084, 1087 (9th Cir. 2000).

14 It is the role of the trier of fact, not this court, to resolve
15 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
16 supports more than one rational interpretation, the court may not
17 substitute its judgment for that of the Commissioner. *Tackett*, 180
18 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
19 Nevertheless, a decision supported by substantial evidence will
20 still be set aside if the proper legal standards were not applied in
21 weighing the evidence and making the decision. *Browner v. Secretary*
22 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
23 substantial evidence exists to support the administrative findings,
24 or if conflicting evidence exists that will support a finding of
25 either disability or non-disability, the Commissioner's
26 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
27 1230 (9th Cir. 1987).

28 SEQUENTIAL PROCESS

29 The Commissioner has established a five-step sequential
30 evaluation process for determining whether a person is disabled. 20
31 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
32 137, 140-42 (1987). In steps one through four, the burden of proof

1 rests upon the claimant to establish a prima facie case of
2 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
3 This burden is met once a claimant establishes that a physical or
4 mental impairment prevents him from engaging in his previous
5 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
6 claimant cannot do his past relevant work, the ALJ proceeds to step
7 five, and the burden shifts to the Commissioner to show that (1) the
8 claimant can make an adjustment to other work; and (2) specific jobs
9 exist in the national economy which claimant can perform. *Batson v.*
10 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
11 If a claimant cannot make an adjustment to other work in the
12 national economy, a finding of "disabled" is made. 20 C.F.R. §§
13 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

14 ISSUES

15 Plaintiff contends that the court erred by discounting
16 Plaintiff's credibility and by improperly weighing the medical
17 evidence. ECF No. 16 at 15.

18 ANALYSIS

19 A. Credibility

20 The Plaintiff contends that the ALJ erred by discounting
21 Plaintiff's credibility. ECF No. 16 at 18. In analyzing the
22 Plaintiff's credibility, the ALJ noted that the Plaintiff "performs
23 basic activities of daily living without the assistance of others."
24 Tr. 20. The ALJ also relied upon the fact that Plaintiff does not
25 need prompts or cues for daily tasks, and he is able to plan and
26 prepare meals, perform housework, do laundry, shop, drive a car and
27 pay bills. Tr. 20. The ALJ also noted that the Plaintiff admitted
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1 he listens to music, watches, movies and spends "extensive periods
2 of time on the computer performing such activities such as photo re-
3 touching and browsing social media outlets such as Facebook and
4 MySpace." Tr. 20. The ALJ concluded "overall, the activities
5 reported by claimant are inconsistent with his allegations of total
6 mental disability under the Social Security Act." Tr. 20.

7 An adverse finding of credibility must be based on "clear and
8 convincing reasons" where no affirmative evidence exists of a
9 claimant's malingering and "the record includes objective medical
10 evidence establishing that the claimant suffers from an impairment
11 that could reasonably produce the symptoms of which he complains."
12 *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1160 (9th
13 Cir. 2008)(quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th
14 Cir. 2007)). Daily activities that are transferable to a work
15 setting may be grounds for an adverse credibility finding. *Fair v.*
16 *Bowen*, 885 F.2d 597, 603 (9th cir. 1989). However, daily activities
17 that do not contradict a claimant's other testimony, or meet the
18 threshold for transferable work skills, cannot form the basis of an
19 adverse credibility determination. *Orn v. Astrue*, 495 F.3d 625,
20 639 (9th Cir. 2007).

21 [T]he mere fact that a plaintiff has carried on certain
22 activities such as grocery shopping, driving a car, or
23 limited walking for exercise, does not in any way detract
24 from her credibility as to her overall disability. One
does not need to be 'utterly' incapacitated in order to be
disabled.

25 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001). An ALJ may
26 conclude "the severity of . . . limitations were exaggerated" when
27 a claimant exercises, gardens, and participates in community
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1 activities. *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685,
2 693 (9th Cir. 2009). When a claimant spends a substantial part of
3 the day "engaged in pursuits involving the performance of physical
4 functions that are transferable to a work setting, a specific
5 finding as to this fact may be sufficient to discredit a claimant's
6 allegations." *Morgan*, 169 F.3d at 600. An ALJ must make a specific
7 finding relating to the transferability of the activities to a
8 workplace to refute a plaintiff's allegations of disability. *Orn*,
9 495 F.3d at 639.

10 In this case, the ALJ considered Plaintiff's daily activities
11 -which included watching television, using the computer, preparing
12 an occasional meal, and housework-and concluded his activities were
13 inconsistent with his complaints of a severe mental illness. Tr.
14 20. The record does not support the ALJ's conclusion. Moreover,
15 the ALJ failed to make a specific finding relating to the
16 transferability of Plaintiff's activities to a workplace. *Orn*, 495
17 F.3d at 639.

18 The record reveals Plaintiff testified he never leaves his
19 home, but he has one friend who visits once or twice per week. Tr.
20 41-42. He does not regularly grocery shop, attend a club or church,
21 and he spends "[e]very day all day" in his room. Tr. 41-45. He
22 does not leave his room unless he must. Tr. 46. Plaintiff said he
23 does not like being around people because he is afraid he will be
24 judged. Tr. 46. Plaintiff's use of the computer is limited and
25 includes visiting social media sites, and retouching photographs.
26 Tr. 34. Plaintiff also watches movies, and attends therapy. Tr.
27 35; 44. Plaintiff testified that his sister controls all his
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1 appointments and scheduling. Tr. 42. Plaintiff said that his life
2 is "not normal. I can't do anything. I can't, I can't be active.
3 I mean, come on, I'm 21. I'm supposed to go out with friends, go to
4 clubs, have a job, have a car. Just can't - I can't do any of
5 that." Tr. 45. Plaintiff's description of his daily activities to
6 Dr. Toews was consistent with his hearing testimony. Dr. Toews'
7 report indicates that Plaintiff said his favorite activities are
8 smoking, listening to music and computer work. Tr. 182. Plaintiff's
9 typical day includes waking up, smoking, eating breakfast followed
10 by purging, computer work, lunch followed by purging, smoking,
11 dinner, listening to music, and bed. Tr. 182.

12 ALJ Ausems failed to explain how Plaintiff's limited daily
13 activities could be transferred to a work setting, and the ALJ also
14 failed to find that Plaintiff spent a "substantial" part of his day
15 engaged in such activities. See *Orn*, 495 F.3d at 639 (the ALJ erred
16 in failing to "meet the threshold for transferable work skills, the
17 second ground for using daily activities in credibility
18 determinations"). In the absence of these findings, the ALJ erred
19 by relying upon Plaintiff's daily activities to impugn his
20 credibility.

21 When a reason for an adverse credibility determination is
22 legally insufficient, the court considers whether the reliance on an
23 invalid reason was a harmless error. See *Batson*, 359 F.3d at
24 1195-97 (applying a harmless error standard where part of the
25 credibility finding was invalid). The error is deemed harmless
26 where substantial evidence exists that supports the ALJ's
27 conclusions on credibility and the error "does not negate the
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1 validity of the ALJ's ultimate credibility conclusion." *Carmickle*,
2 533 F.3d at 1162 (quoting *Batson*, 359 F.3d at 1197). In this case,
3 the finding regarding Plaintiff's daily activities was insufficient
4 because this was the primary reason the ALJ gave for discounting
5 Plaintiff's credibility. As a result, no substantial evidence
6 remains to support the credibility finding, and the ALJ's error was
7 not harmless. The court must remand for a new determination of
8 Plaintiff's credibility.

9 **B. Medical opinions**

10 Plaintiff contends that the ALJ erred in weighing the medical
11 evidence. ECF No. 16 at 16.

12 **1. Heather McClure, ARNP**

13 The ALJ gave little weight to the opinions of Heather McClure,
14 ARNP. Tr. 21. The ALJ concluded that Ms. McClure's opinions were
15 "inconsistent with the overall objective medical findings in the
16 record, including the opinion of Dr. Kraft" and inconsistent with
17 "the mental abilities that the claimant has demonstrated in
18 conjunction with his performance of his acknowledged wide-ranging
19 activities and hobbies." Tr. 21.

20 Ms. McClure initially examined Plaintiff on February 19, 2008,
21 and treated him from August 6, 2008, through August 18, 2009. Tr.
22 203; 284-309. During the initial exam, Ms. McClure noted that
23 Plaintiff was disheveled, he pulled his t-shirt over his mouth when
24 he was not talking, and when he talked, he moved the t-shirt to his
25 chin but was careful to never show his neck. Tr. 204. Ms. McClure
26 observed Plaintiff's behavior as "extremely passive and eye contact
27 is poor. Mood depressed. Affect flat and depressed." Tr. 204.

1 Ms. McClure diagnosed Plaintiff with generalized anxiety disorder,
2 bulimia nervosa, depressive disorder, NOS, and borderline
3 personality disorder. Tr. 205. She assigned him a GAF of 45. Tr.
4 205.

5 On April 20, 2009, Ms. McClure completed a Psychological/
6 Psychiatric Evaluation. Tr. 254-57. She assessed Plaintiff with
7 severe impairments in verbal expression of anxiety or fear and
8 social withdrawal, and two marked impairments in both physical
9 complaints and global illness. Tr. 255. Ms. McClure also assessed
10 Plaintiff with marked impairments in the abilities to (1)
11 understand, remember and follow simple instructions; (2) relate
12 appropriately to co-workers and supervisors; (3) interact
13 appropriately in public contacts; and (4) respond appropriately to
14 and tolerate the pressure and expectations of a normal work setting.
15 Tr. 256. She opined treatment would decrease Plaintiff's anxiety
16 and self-harming behaviors. Tr. 257.

17 The ALJ's gave little weight to Nurse McClure's opinion because
18 her assessment contradicted the overall medical record, Dr. Kraft's
19 opinion, and Plaintiff's abilities demonstrated in his daily
20 activities:

21 Ms. McClure's opinions in this regard are inconsistent
22 with the overall objective medical findings in the record,
23 including the opinion of Dr. Kraft, who reviewed the
24 entire medical evidence of record. Ms. McClure's opinions
25 are also inconsistent with the mental abilities that the
26 claimant has demonstrated in conjunction with his
27 performance of his acknowledged wide-ranging activities
28 and hobbies.

Tr. 21.

In general, more weight should be given to the opinion of a

1 treating doctor than to a non-treating doctor, and more weight to
2 the opinion of an examining doctor than to a non-examining doctor.
3 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where not
4 contradicted by another doctor, a treating or examining doctor's
5 opinion may be rejected only for "clear and convincing reasons."
6 *Id.* at 830-31. Where contradicted, a treating or examining doctor's
7 opinion may not be rejected without "specific and legitimate
8 reasons" that are supported by substantial evidence in the record.
9 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th
10 Cir. 1983)). An ALJ must set out a detailed and thorough summary of
11 the facts and conflicting evidence, stating his or her
12 interpretation of the facts and evidence, and making findings.
13 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ
14 must do more than offer conclusions; the ALJ must also explain why
15 his or her interpretation, rather than the treating doctor's
16 interpretation, is correct. *Orn*, 495 F.3d at 632 (citing *Embrey v.*
17 *Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

18 To the extent the ALJ rejected Nurse McClure's opinion on the
19 basis that her opinions were contradicted by nonexamining Dr. Kraft,
20 the ALJ erred. "A treating physician's opinion must be given
21 controlling weight if it is well-supported and not inconsistent with
22 the other substantial evidence in the record." *Lingenfelter v.*
23 *Astrue*, 504 F.3d 1028, 1038 n.10 (9th Cir. 2007). When a nontreating
24 physician's opinion contradicts a treating physician's opinion, but
25 is not based on independent clinical findings, or rests on clinical
26 findings also considered by the treating physician, the treating
27 physician's opinion may be rejected only if the ALJ gives "specific,
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1 legitimate reasons for doing so that are based on substantial
2 evidence in the record." *Morgan*, 169 F.3d at 600. "The opinion of
3 a nonexamining physician cannot by itself constitute substantial
4 evidence that justifies the rejection of the opinion of either an
5 examining physician or a treating physician." *Lester*, 81 F.3d at
6 831.

7 In this case, Ms. McClure's opinions were well-supported by her
8 treatment notes and were consistent with the medical evidence in the
9 record. The medical records from Plaintiff's treating and examining
10 physicians corroborate Plaintiff's limitations from his mental
11 disorders. Tr. 137; 139-40; 145-47; 180-83; 203-05; 247-050; 254-
12 57. As such, the existence of a contradictory opinion from a
13 nonexamining physician is not a valid reason upon which to dismiss
14 a treating medical provider opinion.

15 Finally, the ALJ's remaining reason for discounting Nurse
16 McClure's opinion - that her opinions were contradicted by the
17 mental abilities displayed by Plaintiff in his "wide-ranging
18 activities and hobbies" - is not supported by the record. The ALJ's
19 assertion that Plaintiff's daily activities are "wide-ranging" and
20 display mental abilities inconsistent with Ms. McClure's assessment
21 is not supported by the record. Instead, as discussed above,
22 Plaintiff's daily activities are minimal - he watches movies, uses
23 a computer, and he rarely leaves his room. These activities are
24 neither properly characterized as "wide-ranging," nor do these
25 activities indicate that Plaintiff's mental abilities are contrary
26 to Ms. McClure's assessment. Because the record does not support
27 the ALJ's reasons for discounting Ms. McClure's opinions, the ALJ
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1 erred in giving her opinion little weight. On remand, the ALJ
2 should reconsider the opinion of Ms. McClure and provide valid
3 reasons for the weight she assigns to Ms. McClure's opinion.

4 **2. Jay M. Toews, Ed.D.**

5 The ALJ gave little weight to Dr. Toews' opinion that Plaintiff
6 would be unable to sustain employment due to his multiple
7 psychiatric problems. Tr. 21. The ALJ's offered reasons for
8 rejecting Dr. Toews' opinion were based upon the assertions that his
9 opinion was inconsistent with his own observations, with Dr. Kraft's
10 opinions, and with Plaintiff's daily activities:

11 Dr. Toews' opinion in this regard is found to be
12 internally inconsistent with the objective observations he
13 reported upon mental status examination; moreover, his
14 opinion is inconsistent with the overall objective medical
evidence, including the opinion from Dr. Kraft, and the
claimant's admitted significant activities of daily
living."

15 Tr. 21. Dr. Toews examined Plaintiff on March 20, 2008, and noted
16 Plaintiff appeared sad and depressed. Tr. 182. Plaintiff's scores
17 on the Beck Depression Inventory-II and Beck Anxiety Inventory were
18 both in the severe and the moderately severe range, respectively.
19 Tr. 182. Dr. Toews observed visible scars on Plaintiff's arms from
20 self-mutilation. Tr. 182. Dr. Toews observed Plaintiff to be
21 "severely depressed and severely anxious with obsessive thoughts."
22 Tr. 183. Dr. Toews opined that Plaintiff is cognitively intact, but
23 his mental acuity and his attention and concentration are all
24 affected by anxiety and depression. Tr. 183. Dr. Toews also opined
25 that while Plaintiff's "psychiatric symptoms are severe in and of
26 themselves," the symptoms were "compounded by substance abuse." Tr.
27 183. Dr. Toews concluded that Plaintiff has a severe adjustment
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1 disorder, eating disorder, and major depression, and Plaintiff was
2 unable to sustain employment due to his multiple psychiatric
3 problems. Tr. 183. Dr. Toews opined that Plaintiff requires
4 intensive one-on-one psychotherapy with a skilled therapist. Tr.
5 183. Dr. Toews' prognosis for Plaintiff was that "[w]ith
6 appropriate treatment and abstinence from alcohol and drugs, he
7 would have a good prognosis." Tr. 183.

8 The ALJ failed to provide sufficient "specific and legitimate"
9 reasons for giving little weight to the opinions of examining Dr.
10 Toews. See *Lester*, 81 F.3d at 830 (ALJ must provide "specific and
11 legitimate" reasons supported by substantial evidence for rejecting
12 opinions of examining physician); see also *Magallanes*, 881 F.2d at
13 751 (ALJ should provide detailed and thorough summary of the facts
14 and conflicting clinical evidence, stating his/her interpretation,
15 and making findings); *Reddick*, 157 F.3d at 725 (ALJ must set forth
16 own interpretations and explain why they, rather than the doctor's,
17 are correct).

18 With Dr. Toews's assessment, the ALJ failed to provide a
19 detailed and thorough summary of the conflicting evidence, and
20 stating her interpretation of the facts and explaining how her
21 interpretations, rather than Dr. Toews' conclusions, are correct.
22 First, the ALJ failed to specify how Dr. Toews' conclusions were
23 contradicted by his observations. Upon review, contradictions in
24 Dr. Toews' observations and conclusions are not apparent. Instead,
25 Dr. Toews' overall observations, findings and conclusions are
26 consistent. Moreover, as analyzed above, the ALJ's characterization
27 of Plaintiff's "significant activities of daily living" is not
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1 supported by the record. Plaintiff's minimal daily activities do
2 not contradict, but instead support Dr. Toews' assessment of
3 Plaintiff's limitations. Finally, the ALJ may not reject an
4 examining physicians' opinions simply based upon a contradiction
5 with a nonexamining physician's opinions. See *Lester*, 81 F.3d at
6 830. The ALJ's proffered reason that Dr. Toews' assessment is
7 entitled to little weight because his conclusions differed from
8 nonexamining Dr. Kraft's opinions was error.

9 The ALJ's reasons for giving little weight to Dr. Toews'
10 opinions did not constitute "specific and legitimate" reasons and,
11 thus, was legal error. On remand, the ALJ should reconsider the
12 opinion of Dr. Toews and provide valid reasons for the weight she
13 assigns to his opinion.

14 **3. Tracy Moline, MSW; Ronda Eucker, MSW; Travis S. Gunn, LCSW**

15 The ALJ gave little weight to evaluations from three social
16 workers - Tracy Moline, MSW, Ronda Eucker, MSW and Travis Gunn,
17 LCSW - who evaluated Plaintiff in 2007 and 2008. Tr. 20-21. The
18 ALJ rejected the opinions because they were from "DSHS non-
19 acceptable medical source mental health evaluators," each were
20 internally inconsistent with the objective findings and with the
21 "medical evidence as a whole." Tr. 21.

22 Tracy Moline, MSW, completed a Psychological/Psychiatric
23 Evaluation of Plaintiff on July 24, 2007. Tr. 138-41. Ms. Moline
24 assessed Plaintiff with four severe impairments in depressed mood,
25 suicidal trends, paranoid behavior and physical complaints. She
26 assessed Plaintiff with three marked impairments in verbal
27 expression of anxiety or fear, expression of anger, and global
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1 illness. Tr. 139. In cognitive functioning, Ms. Moline found
2 Plaintiff exhibited marked limitations in the ability to exercise
3 judgment and make decisions, and moderate impairments in the
4 abilities to understand, remember and follow simple as well as
5 complex instructions and learn new tasks. Tr. 140. Ms. Moline
6 found that socially, Plaintiff was severely impaired in his ability
7 to interact appropriately in public contacts and markedly limited in
8 his ability to care for himself, including personal hygiene and
9 appearance. Tr. 140. Ms. Moline opined Plaintiff needed inpatient
10 treatment for his eating disorder. Tr. 141. Ms. Moline rated
11 Plaintiff as chronically mentally ill. Tr. 141.

12 Ronda Eucker, MSW, completed a Psychological/Psychiatric
13 Evaluation of Plaintiff on December 5, 2007. Tr. 144-47. Ms.
14 Eucker also conducted an Initial Assessment of Plaintiff on January
15 15, 2008. Tr. 153-59. Ms. Eucker found that Plaintiff was severely
16 impaired in social withdrawal and thought disorder, and markedly
17 impaired in verbal expression of anxiety or fear. Tr. 145. Ms.
18 Eucker assessed Plaintiff with moderate impairments in the ability
19 to understand, remember, and follow complex instructions. Tr. 146.
20 She found that socially, Plaintiff was severely impaired in his
21 abilities to relate appropriately to co-workers, interact
22 appropriately in public contacts, and respond appropriately to and
23 tolerate the pressure and expectations of a normal work setting.
24 Tr. 146. Ms. Eucker also found that Plaintiff was moderately
25 impaired in his ability to control physical or motor movements and
26 maintain appropriate behavior. Tr. 146. Ms. Eucker opined that
27 medication and counseling may alleviate symptoms enough to
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1 eventually enable Plaintiff to work or go to school. Tr. 147. She
2 assessed Plaintiff as "seriously disturbed." Tr. 147.

3 In Ms. Eucker's January 2008, assessment, she noted that
4 Plaintiff "spent most of the interview with the front of his shirt
5 pulled up to hide most of his face." Tr. 153. Ms. Eucker also
6 noted that Plaintiff's "beliefs about his body would be considered
7 delusional as he is a very average looking man with an average
8 height and build." Tr. 153.

9 Travis S. Gunn, LCSW, completed a Psychological/Psychiatric
10 Evaluation of Plaintiff on June 5, 2008. Tr. 247-52. Mr. Gunn
11 assessed Plaintiff with severe impairments in social withdrawal and
12 marked impairments in verbal expression of anxiety or fear,
13 expression of anger, paranoid behavior, and global illness. Tr.
14 248. Mr. Gunn found that Plaintiff's cognitive functioning was
15 overall mildly impaired, and his social functioning was severely
16 impaired in the ability to respond appropriately to and tolerate the
17 pressures and expectations of a normal work setting, and markedly
18 impaired in his ability to relate appropriately to co-workers and
19 supervisors, and interact appropriately in public contacts. Tr.
20 249. Mr. Gunn noted that Plaintiff had been on Prozac until two
21 days prior to the assessment, when he suffered a panic attack and
22 stopped, but was scheduled to visit his provider to discuss
23 medication. Tr. 249. Mr. Gunn opined that if Plaintiff was taking
24 the correct medication, was consistent with treatment and completed
25 an eating disorder inpatient program, he could participate in
26 educational or employment activities. Tr. 250. Mr. Gunn assessed
27 Plaintiff as "chronically mentally ill." Tr. 250.

1 The ALJ's first reason for giving little weight to the opinion
2 from the social workers was because they were "non-acceptable
3 medical source mental health evaluators." Tr. 21. Every medical
4 opinion, regardless of its source, is to be considered by the ALJ in
5 a social security disability proceeding. 42 U.S.C. § 423(d)(5)(B);
6 20 C.F.R. § 404.1527(d). "Medical sources" refers to both
7 acceptable medical sources and other health care providers who are
8 not acceptable medical sources. See 20 C.F.R. § 416.902. Evidence
9 from "other sources" should be used to show the severity of a
10 claimant's impairments and how the impairments affect the claimant's
11 ability to work. 20 C.F.R. § 404.1513(d). "Other sources" includes
12 licensed social workers. 20 C.F.R. § 404.1513(d)(1).

13 Non-acceptable medical sources should be evaluated under the
14 same factors as all other medical opinions.² SSR 06-03p. These
15 factors include: (1) how long the source has known and how
16 frequently the source has seen the individual; (2) how consistent
17 the opinion is with other evidence; (3) the degree to which the
18 source presents relevant evidence to support an opinion; (4) how
19 well the source explains the opinion; (5) whether the source has a
20 specialty or area of expertise related to the individual's
21 impairments; and (6) any other factors that tend to support or
22 refute the opinion. SSR 06-03p. Depending upon the facts of a
23 case, an opinion from a non-acceptable medical source may outweigh
24 the opinion of an acceptable medical source. SSR 06-03p. As a
25 result, dismissing a medical opinion for the reason that it
26 originates from a non-acceptable medical provider is error. The ALJ

27 ²See 20 C.F.R. § 404.1527(d) and 416.927(d).
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1 is required to review the opinions from these non-accepted sources
2 and evaluate the assessments pursuant to the regulations.

3 The ALJ's second reason for giving little weight to these
4 opinions was a general statement that each opinion was internally
5 inconsistent and inconsistent with the "medical evidence as a
6 whole." Tr. 21. Again, the ALJ's summary statement is insufficient
7 to reject an examining medical provider's opinion. See *Lester*, 81
8 F.3d at 830 (ALJ must provide "specific and legitimate" reasons
9 supported by substantial evidence for rejecting opinions of
10 examining physician); and see *Magallanes*, 881 F.2d at 751 (ALJ
11 provides "specific and legitimate" reasons by setting out a detailed
12 and thorough summary of the facts and conflicting clinical evidence,
13 stating his interpretation thereof, and making findings); *Reddick*,
14 157 F.3d at 725 (ALJ must set forth own interpretations and explain
15 why they, rather than the doctor's, are correct).

16 Moreover, the ALJ's conclusions are not supported by the
17 record. Instead, the three social worker conclusions are each
18 supported by their respective observations of Plaintiff. Also,
19 contrary to the ALJ's conclusion, a review of the record reveals the
20 weight of the medical evidence - much of which the ALJ improperly
21 discounted - supports the opinions expressed by these medical
22 providers that Plaintiff suffers from severe and marked impairments,
23 and he requires intense treatment before he can enter the workforce
24 or begin school. Tr. 137; 139-40; 145-47; 180-83; 203-05; 247-050;
25 254-57. As a result, the ALJ's weighing of these opinions was legal
26 error. On remand, the ALJ should reconsider these opinions and
27 provide valid reasons for the weight she assigns to each of the
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1 three opinions from the social workers who examined Plaintiff.

2 **4. John McRae, Ph.D.**

3 The ALJ gave "little weight" to the December 7, 2007, opinion
4 from John McRae, Ph.D., because his opinion was based upon his
5 review of "only two other opinions reported by individuals who are
6 not considered 'acceptable medical sources'" and because his opinion
7 was inconsistent with the overall objective medical evidence and was
8 contradicted by nonexamining physician Patricia Kraft, Ph.D. Tr.
9 20.

10 John McRae, Ph.D., completed a Certification for Medicaid form
11 on December 26, 2007. Tr. 137. Dr. McRae's findings are cursory.
12 He found that Plaintiff needed long-term therapy and vocational
13 rehabilitation before Plaintiff could work. Tr. 137. Dr. McRae
14 noted several evaluations observed that Plaintiff had an eating
15 disorder and a problem with self-mutilation. Tr. 137. Dr. McRae
16 concluded Plaintiff was severely socially isolated and limited. Tr.
17 137. Dr. McRae approved Plaintiff for medicaid benefits. Tr. 137.

18 As analyzed above, the ALJ improperly rejected the medical
19 opinions from the non-acceptable medical sources. To the extent the
20 ALJ rejected Dr. McRae's opinion because it was based upon the
21 opinions of non-accepted medical providers, the ALJ erred.
22 Moreover, contrary to the ALJ's conclusion, Dr. McRae's opinion that
23 Plaintiff needed therapy and training to be able to work was
24 consistent with the majority of the medical evidence in the record.
25 Tr. 137; 139-40; 145-47; 180-83; 203-05; 247-50; 254-57. As a
26 result, the ALJ erred in weighing the opinion from Dr. McRae. On
27 remand, the ALJ should reconsider the opinion of Dr. McRae, and
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1 provide valid reasons for the weight she assigns to his opinion.

2 **5. Patricia Kraft, Ph.D.; James Bailey, Ph.D.**

3 The ALJ gave "great weight" to the opinions of the two
4 nonexamining physicians: Patricia Kraft, Ph.D., and James Baily,
5 Ph.D. Tr. 22. The ALJ's explanation for relying heavily upon the
6 reviewing physicians was that the opinions were "well-supported by
7 the overall objective medical evidence and the claimant's admissions
8 regarding his significant activities of daily living." Tr. 22.

9 Patricia Kraft, Ph.D., completed a Psychiatric Review Technique
10 Form on April 7, 2008. Tr. 184. Dr. Kraft noted Plaintiff had
11 dysthymic disorder, adjustment disorder with mixed features, severe,
12 anxiety disorder, NOS, moderate and bulimia nervosa, acute, and
13 rule-out borderline personality disorder features, along with
14 episodic polysubstance and alcohol abuse. Tr. 187; 189; 191-92.
15 Dr. Kraft checked the boxes indicating Plaintiff had moderate
16 limitations in maintaining social functioning, concentration,
17 persistence or pace, and had one or two episodes of decompensation,
18 each of extended duration. Tr. 194. Dr. Kraft did not give "full
19 weight" to Dr. Toews' opinion "as preponderance of [medical evidence
20 of record] suggests [claimant] can do simple work away from the
21 general public." Tr. 196. Dr. Kraft also completed a Mental
22 Residual Functional Capacity Assessment form, and she checked the
23 boxes that indicated Plaintiff was moderately limited in several
24 categories, and markedly limited in the ability to interact with the
25 public. Tr. 198-99.

26 James Bailey, Ph.D., completed a cursory "case analysis" form
27 on July 10, 2008, and stated that Plaintiff was seen at a mental
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1 health appointment and his interview behavior was "passive but
2 slightly manipulative...." Tr. 218. Dr. Bailey affirmed Dr.
3 Kraft's opinion. Tr. 218.

4 These nonexamining physician opinions contradict the opinions
5 of the treating and examining physicians. Tr. 137; 139-40; 145-47;
6 180-83; 203-05; 247-050; 254-57. As noted, "a treating physician's
7 opinion must be given controlling weight if it is well-supported and
8 not inconsistent with the other substantial evidence in the record."
9 *Lingenfelter*, 504 F.3d at 1038 n.10. "The opinion of a nonexamining
10 physician cannot by itself constitute substantial evidence that
11 justifies the rejection of the opinion of either an examining
12 physician or a treating physician." *Lester*, 81 F.3d at 831.

13 In this case, the ALJ failed to provide "specific and
14 legitimate" reasons for rejecting the opinions from treating medical
15 providers and instead adopting the opinions from nonexamining
16 physicians. Again, the ALJ failed by offering only summary
17 conclusions. The ALJ did not set out a detailed and thorough
18 summary of the facts and conflicting clinical evidence, stating her
19 interpretation thereof, and making findings that explained why the
20 interpretation of these physicians, rather than the examining and
21 treating medical providers, are correct. See *Magallanes*, 881 F.2d
22 at 751; *Reddick*, 157 F.3d at 725. A review of the record reveals
23 the evidence does not support Dr. Kraft and Dr. Bailey's
24 assessments. Tr. 137; 139-40; 145-47; 180-83; 203-05; 247-050; 254-
25 57. Instead, the objective medical evidence in the record, as
26 interpreted by Plaintiff's treating and examining medical providers,
27 indicates Plaintiff is severely impaired and requires intense
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1 treatment before he can enter the workforce or school. The ALJ must
2 "give weight not only to the treating physician's clinical findings
3 and interpretation of test results, but also to [their] subjective
4 judgments." *Lester*, 81 F.3d at 832-33.

5 Moreover, as discussed above, the ALJ's characterization of
6 Plaintiff's "significant activities of daily living" is not
7 supported by the record. The Plaintiff's minimal daily activities
8 is not a "specific and legitimate" reason supported by the record
9 that justifies favoring two nonexamining opinions over treating and
10 examining medical provider opinions and, thus, the ALJ's weighing of
11 Dr. Kraft and Dr. Bailey's opinions was error. On remand, the ALJ
12 should reconsider the opinions of the nonexamining doctors and
13 provide valid reasons for the weight she assigns to Dr. Kraft and
14 Dr. Bailey's opinions.

15 **C. Remedy**

16 When an ALJ's denial of benefits is not supported by the
17 record, "the proper course, except in rare circumstances, is to
18 remand to the agency for additional investigation or explanation."
19 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (internal
20 quotation marks omitted). The court may exercise discretion and
21 direct an award of benefits "where no useful purpose would be served
22 by further administrative proceedings and the record has been
23 thoroughly developed." *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th
24 Cir. 1989). Remand for further proceedings is appropriate where
25 outstanding issues exist that must be resolved before a
26 determination can be made, and it is not clear from the record that
27 the ALJ would be required to find the claimant disabled if all the
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1 evidence were properly evaluated. See *Vasquez v. Astrue*, 572 F.3d
2 586, 593 (9th Cir. 2009); cf. *Reddick*, 157 F.3d at 729. This case
3 must be remanded for the ALJ to provide "a detailed and thorough
4 summary of the facts and conflicting clinical evidence, stating
5 [her] interpretation thereof, and making findings." *Reddick*, 157
6 F.3d at 725.

7 Here, it is not clear from the record that the ALJ would be
8 required to find Plaintiff disabled if the evidence described above
9 was properly considered. The record may contain evidence that the
10 ALJ could cite to provide the requisite specific, legitimate reasons
11 for rejecting the medical opinions, so remand is the proper remedy.
12 Therefore, the court finds remand for further proceedings is
13 appropriate to allow the ALJ to remedy the above mentioned errors.

14 CONCLUSIONS AND RECOMMENDATIONS

15 The court has reviewed the record and considered the briefing
16 by the parties. For the reasons stated above, **IT IS RECOMMENDED** that
17 Plaintiff's Motion for Summary Judgment (ECF No. 15) be **GRANTED** and
18 Defendant's Motion for Summary Judgment (ECF No. 18) be **DENIED**.

19 OBJECTIONS

20 Any party may object to a magistrate judge's proposed findings,
21 recommendations, or report within **fourteen (14)** days following
22 service with a copy thereof. Such party shall file written
23 objections with the Clerk of the Court and serve objections on all
24 parties, specifically identifying the portions to which objection is
25 being made, and the basis therefor. Any response to the objection
26 shall be filed within **fourteen (14)** days after receipt of the
27 objection. Attention is directed to FED. R. CIV. P. 6(d), which adds
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1 additional time after certain kinds of service.

2 A district judge will make a *de novo* determination of those
3 portions to which objection is made and may accept, reject, or
4 modify the magistrate judge's determination. The judge need not
5 conduct a new hearing or hear arguments and may consider the
6 magistrate judge's record and make an independent determination
7 thereon. The judge may, but is not required to, accept or consider
8 additional evidence, or may recommit the matter to the magistrate
9 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621
10 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and ©, FED. R. CIV. P. 72;
11 LMR 4, Local Rules for the Eastern District of Washington.

12 A magistrate judge's recommendation cannot be appealed to a
13 court of appeals; only the district judge's order or judgment can be
14 appealed.

15 The District Court Executive is directed to enter this report
16 and forward copies to the parties and the referring judge.

17 DATED May 9, 2013.

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19 S/ CYNTHIA IMBROGNO
20 UNITED STATES MAGISTRATE JUDGE
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